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No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RALPH C. BEHNING, et al,

Petitioner,

vs.

CAMELBACK SKI CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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QUESTION PRESENTED FOR REVIEW

Does the fixed site nature of the Defendant's multi-State recreational facility require an assertion of the Forum State's general jurisdictional powers under the Due Process Clause of the Fourteenth Amendment?

PARTIES

There were three parties to the proceedings in the Court of Appeals of Maryland. They are the Petitioners, Ralph C. and Mary Behning, and the Respondent Camelback Ski Corporation. A separate Corporation known as Camelback Associates, Inc. was originally sued. Judgment was entered in favor of that corporation was entered in the Circuit Court for Baltimore County. This judgment was not appealed. Another ski resort, Sugarbush (Vermont) sought and was granted leave to file an Amicus brief.

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Ralph C. and Mary Behning, respectfully petition for a Writ of Certiorari to review the final decision of the Court of Appeals of Maryland entered in this case on August 25, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported at 513 A.2d 874 (1986) (307 Md. 270).

The opinion of the Court of Special Appeals of Maryland is reported at 484 A.2d 646 (1984) (61 Md. App.11).

The opinion of the Court of Appeals of Maryland is reprinted in Appendix A. The opinion of the Court of Special Appeals is reprinted in Appendix B. The opinions of the Circuit Court for Baltimore County are reprinted in Appendices C and D.

JURISDICTION

The opinion and decision of the Court of Appeals of Maryland reversing the decision of the Court of Special Appeals of Maryland and affirming the judgment of the Circuit Court for Baltimore County, dismissing Petitioners suit for lack of personal jurisdiction over the Defendant, was entered on August 25, 1986. This Court has jurisdiction to review the final decision of the

Court of Appeals of Maryland by Writ of Certiorari pursuant to 28 U.S.C. sec 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

The Due Process Clause of Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

MARYLAND STATUTES

MARYLAND CODE ANNOTATED, COURTS AND JUDICIAL PROCEEDINGS ARTICLE, sec 6-103 (b) (4) provides:

> (b) In general—A court may exercise personal jurisdiction over a person, who directly or by an agent;
>
> (4) Causes tortious injury in the State or outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from goods, food, services or manufactured products used or consumed in the State.

* * *

STATEMENT OF THE CASE

I.

PROCEDURAL STATUS AND METHOD OF RAISING AND DISPOSING OF CONSTITUTIONAL ISSUE IN STATE COURTS.

The Petitioners, Ralph C. and Mary Behning (hereafter "Behnings") are Maryland residents. The Respondent, Camelback Ski Corporation (hereafter Camelback) is a Pennsylvania corporation that operates a ski resort in the Pocono Mountains in Eastern Pennsylvania. The Behnings filed suit in the Circuit Court for Baltimore County for injuries sustained by Ralph Behning while skiing at Camelback. Camelback filed a motion

raising preliminary objection to the suit on the ground of lack of personal jurisdiction.[1]

The motion was considered by the Circuit Court for Baltimore County on the pleadings, affidavits, discovery documents and arguments of the parties. The Court found the existence of certain contacts between Camelback and this State and initially determined that these contacts were sufficient to support jurisdiction. (App. C) Upon reconsideration, he reversed his earlier ruling, finding that the contacts satisfied the statutory requirements for long arm jurisdiction, but were insufficient to satisfy the requirement of due process and the action was dismissed. (App. D)

An appeal was filed to the Court of Special Appeals of Maryland and they reversed. (App B) Camelback petitioned the Court of Appeals of Maryland for a writ of certiorari which was granted.

The Court of Appeals of Maryland reversed and affirmed the decision of the Circuit Court for Baltimore County. (App. A)

This case involves the amenability to suit in Maryland of a ski resort in Pennsylvania which regularly solicits the business patronage of the residents of Maryland, and through the negligent operation of those facilities, has caused serious permanent injuries to two of its citizens.

The trial court found that the facts demonstrated a pattern of "regular . . . solicitation" and a "persistent course of conduct" over the years directed to entice Maryland residents to its regional recreational facility in the Poconos, satisfying the State's long arm Statute; but, that such did not meet the "constitutional and systematic" general business contacts necessary to satisfy due process where, as here, the accident occurs outside the forum.

The State's intermediate appellate court, firmly believing that this Court's holding in *Volkswagen* was controlling and that the defendant had intentionally included Maryland within its regional market, reversed. The Court of Appeals of Maryland granted certiorari and reversed the Court of Special Appeals,

1. The Motion also sought to quash process and was denied. Respondent did not appeal that decision.

holding that the fixed-site nature of the defendant's out of state business precluded an assertion of the State's specific jurisdictional powers and that defendant's "contacts" within the State were insufficient to establish general jurisdiction under the Due Process Clause of the Constitution. They stated:

> "Notwithstanding claims to the contrary by the Behnings, the jurisdiction they seek is general, and not specific. Their cause of action arose out of and is related to the alleged negligence of Camelback in the design, construction and maintenance of its ski slopes in Pennsylvania." (App. A.)

II.
FACTS

As this Court pointed out in *Burger King Corp. vs. Rudzewicz*, 471 U.S. , 105 S. Ct. 2174 (1985), the trial court's finding that Appellant had engaged in "regular . . . solicitation" and a "Persistent course of conduct" within the State of Maryland must stand unless "clearly erroneous". Moreover, this determination is based upon a review of the record as a whole and is not limited to specific facts referred to in the Court's written opinion. *Burger King* supra, at p. 2189. Here, the record taken in the light most favorable to the trial court's findings shows that:

1. Maryland, to the extent Appellee has a destination business, is within its natural marketing area;

2. Overnight or destination business is a substantial part of Appellee's Four Million Dollar per season business on weekends and holidays, and 10% to 20% at other times;

3. Camelback is popular with Maryland residents and Appellee is sure it has many customers from Maryland. As Appellee's head of sales and promotions put it:

> A. We do get business from Maryland.
>
> Q. You do solicit business from Maryland.
>
> A. Upon request and some of the means that you have seen here, we do;

4. Appellee maintains Watts lines for toll free information for customers within its natural marketing area, but outside its local exchange area. And, although it insists that the purchase of such numbers automatically includes Maryland, Connecticut, Delaware, New Jersey, New York, D.C. and Virginia as well as Pennsylvania, its advertising of those toll free numbers in its brochures (while referring specifically to Maryland, D.C. and Virginia, as well as area codes in Eastern Pennsylvania) excludes Western Pennsylvania and Connecticut, which all would agree are outside Appellee's regional market.

5. Appellee prepares brochures each year; and, in conjunction with major hotels (including a Holiday Inn, Sheraton and Best Western, and some 40 others in the area), arranges destination packages for both lodging and skiing at discounted rates. These admittedly are sent (albeit 'upon request') yearly to some 5 to 7 ski shops in the Baltimore-Washington area. Moreover, by giving the discounted rates to these hotels, they know that such would be included in the hotels' advertisements luring skiers to both their hotel and Camelback. By their own admission, the Appellee works "hand in hand" with the hotels.

6. They also supplied their brochure to 'Ski Resorts' magazine (Baltimore-Washington edition) which, in turn, disseminates the merits of skiing at Camelback to its readers or ski enthusiasts in this area.

And, while Appellee claims to have no control over what "Ski Resorts" puts in its magazine, and did not pay for its advertising, they knew that as a "fairly important ski area" they would always be included in any such publication. Moreover, Appellee's admit they supplied the information and gave permission to put the advertisement in the magazine. They wanted to be included in this local publication, and have been since its inception, for the express purpose of soliciting customers from Maryland.

7. That they prepare a group rate discount brochure which they disseminate to ski clubs and tour businesses to attract large groups of skiers. That Eastern Bus Tours has for some time advertised such trips to Camelback and other ski resorts in the

area in the Washington Post and Evening Sun, precisely because of this incentive, and with the full knowledge of Camelback. [As the representative of Eastern Bus Tours stated, ". . . during the winter months, ski trips are one of the few tourist activities in this part of the country"].

8. That these brochures contain a map showing directions to Camelback via various interstates which starts (from the South) at Washington, D.C. and through Baltimore, giving time and distances from both.

9. That finally having saturated their destination market on weekends and holidays, they undertook, together with four major hotels, a new five state promotion (specifically including Maryland) for the '82-'83 season, geared toward increasing destination business during mid-week.

Clearly the lower court had more than sufficient facts to support its conclusion that the Appellee had purposefully entered the economic markets of this State for the express purpose of luring Maryland residents to its ski resort, and had done so by a pattern of regular solicitation over a number of years.

ARGUMENT

THE PURPOSE OF THE "MINIMUM CONTACTS" ANALYSIS OF THE DUE PROCESS CLAUSE IS TO INSURE "FAIR WARNING" TO A NON-RESIDENT DEFENDANT THAT HE IS SUBJECT TO SUIT THERE; AND WHERE ECONOMIC ACTIVITY IS INVOLVED, THE "FAIR WARNING" REQUIREMENT IS SATISFIED IF THE DEFENDANT, AS A MATTER OF COMMERCIAL ACTUALITY, SERVES OR SEEKS TO SERVE THE MARKET PLACE OF A PARTICULAR STATE.

There is certainly no need here to recite the seminal holdings of this Court on the issue of personal jurisdiction. Suffice it to say that this Court's opinions have consistently espoused the flexible nature of the constitutional inquiry and admonished against mechanical approaches in resolving the issue in a particular case.

As we see it, this is exactly what the Maryland Court of Appeals decision has done. Instead of focusing upon the "relationship among the Defendant, the forum and the litigation", it has arbitrarily eliminated any consideration of a possible relationship between the Defendant's own purposeful connection with the forum and the litigation instituted there. And it has done so by the simple expedient of pointing out that the Defendant's business is located in Pennsylvania. According to the decision of the Court of Appeals, unless an operative fact essential to a cause of action for the negligent operation of its facilities in Pennsylvania occurs in Maryland (which is a physical impossibility) the constitutional predicate for an assertion of the state's specific jurisdictional powers is lacking.

This Court in *Burger King Corporation* vs. *Rudzewicz*, 105 S.Ct. 2174 (1985) has only recently defined specific jurisdiction in conjunction with the constitutionally protected interest of the non-resident defendant to "fair warning" of its amenability to suit in another state's courts; and it does not suggest an absolute requirement that either the purposefully affiliating contact of defendant, or an operative fact of the cause of action physically occur within the territorial borders of the forum state:

> "Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum . . . and the litigation results from alleged injuries that 'arise out of or relates to' those activities." 105 S.Ct. at 2182.

This definition is certainly as flexible as the "minimum contacts analysis" it is intended to serve. Clearly it is not the single contact occurring in the forum, but rather the business relationship or connection established with the forum or its residents that is important. So long as the cause of action arises out of the commercial defendant's purposeful connection with the forum state, it has "fair warning" of possible effects or consequences occurring there, regardless of whether the wrongful conduct

occurs within or without the forum. This was essentially the holding of this Court in *World-Wide Volkswagen* vs. *Woodson*, 444 U.S. 286 (1980):

> "the foreseeability that is critical to due process . . . is that the defendant's conduct and *connection* with the forum state are such that he should reasonably anticipate being hailed into court there . . ." 444 U.S. at 297. [emphasis supplied]

In the present case, the defendant admits that the Baltimore/Washington metropolitan area is within its "destination" market; and that market makes up a "substantial" portion of its overall business. To allow an essentially multi-state business operation to avoid suit in one of the states it admittedly seeks to serve, on the basis that it is not within its primary marketing area, begs the question. In both *Burger King* and *McGee* vs. *International Life Insurance Co.* 355 U.S. 220 (1957), one phone call soliciting a business relationship with the resident of another state satisfied the "purposeful availment" test; and because it also created a substantial connection with the forum, it justified jurisdiction over the out of state defendant in a suit arising out of that relationship. Here, it is admitted that the defendant has solicited business within the Maryland over a number of years and it has produced a substantial secondary market with residents of the forum. Certainly the defendant has "fair warning" of possible harm to residents of Maryland from the negligent operation of its facility in Pennsylvania.

The point remains, this Court has never held that specific jurisdiction would require that the plaintiff's cause of action "arise out of" conduct physically occurring within the forum. Indeed, the Court's opinion in *Helicopteros Nacionales de Colombia, S.A.* vs. Hall, 466 U.S. 408, 104 S.Ct. 1868 (1984) takes great pains to dispel such an interpretation; and in *Burger King* supra, the Court reaffirms its prior holdings that physical contacts with the forum while possibly enhancing their relative significance are not a constitutional requirement. 105 S.Ct. at 2184.

The Court of Appeals decision in this case affects far more than the State of Maryland. Almost every state has a "doing business" statute which allows for an assertion of specific jurisdiction over an out of state commercial defendant who "regularly solicits" the business patronage of its citizens; and most have interpreted the application or jurisdictional reach of the statute as coextensive with the limits of due process. See Ap. A-3; and *Helicol* at p. 1871 However, this decision goes beyond merely interpreting the "doing business" statute to the extent of due process limitation. It has imposed new limitations on a subject about which this Court has not definitely spoken. And it does so in the face of a national trend toward larger, costlier and more strategically located fixed-site recreational and retail complexes serving multi-state markets. This case if heard would determine whether fixed-site commercial enterprises who "purposefully derive benefit" from their interstate activities, must submit to the jurisdiction of those states for consequences "proximately" arising from those activities, or whether "the Due Process Clause may [in these cases] . . . be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed". *Burger King*, 105 S.Ct. at 2183.

CONCLUSION

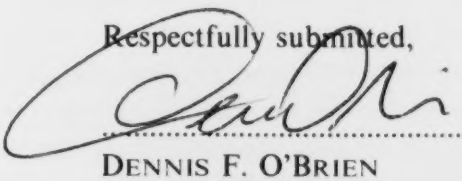
Where a multistate commercial activity is involved, it is the marketing relationship that establishes the defendant's "minimum contacts" with the forum state as to a cause of action "arising out of or relating to" the business enterprise regularly pursued or promoted there.

The Appellant by its own admission is operating in a regional multistate area, insisting only that Maryland is not within its "primary" market. Again, by its own admission, this secondary market accounts for a "substantial" portion of its weekend and holiday business, as well as ten to twenty percent (10 to 20%) of its business mid-week. Clearly, the Appellant has included Maryland within the area it intentionally seeks to serve as a regional ski resort.

The Behnings have suffered and continue to suffer severe permanent damage in Maryland, as a result of this accident in Pennsylvania. Appellant's insistence that the "fixed-site" nature of its interstate business insulates it from suits for the negligent operation of those facilities, in states whose residents it seeks to serve and derive benefit, cannot be predicated upon Constitutional Due Process objections, and indeed would be "unfair". *Burger King*, 105. S.Ct. at 2183.

For the reasons stated the Petitioners request that this Court grant their Petition for Writ of Certiorari to the Court of Appeals of Maryland.

Respectfully submitted,



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APPENDIX

APPENDIX A

513 A.2d 874

CAMELBACK SKI CORPORATION

vs.

RALPH C. BEHNING et al

No. 32, Sept. Term, 1985.

Court of Appeals of Maryland.

August 25, 1986.

Argued before MURPHY, C.J., and SMITH*, ELDRIDGE, COLE, RODOWSKY, COUCH and MCAULIFFE, JJ.

MCAULIFFE, Judge.

We granted certiorari in this case to determine whether a Pennsylvania corporation operating a ski resort in that state had sufficient contacts with Maryland to justify this State's exercise of "long arm" personal jurisdiction over it in a tort action that neither arose out of nor was directly related to the activities of the foreign corporation within this State. We hold it did not.

Ralph Behning, a Maryland resident, suffered severe and permanent injuries in February, 1980, when he fell while skiing at Camelback, a ski resort owned and operated by Camelback Ski Corporation (Camelback) and located in the Poconos mountains of Pennsylvania. In October, 1982, Behning and his wife sued Camelback[1] in the Circuit Court for Baltimore County, claiming damages for alleged negligence of Camelback in the design, construction, maintenance, and "grooming" of one of its ski slopes, and in the failure to correct, or give adequate warning of, an unreasonably dangerous condition on the land. Camelback was

*Smith, J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and adoption of this opinion.

1. Appellees also sued Camelback Associates, Inc., a separate corporation that had developed and sold condominium units or land adjoining the ski resort. Judgment was entered in favor of that corporation pursuant to its motion for summary judgment, and no appeal was taken from that judgment.

served with original process in Pennsylvania, and following an unsuccessful attempt to remove the action to the United States District Court for the District of Maryland, Camelback filed a motion raising preliminary objection, seeking dismissal for lack of jurisdiction.[2] By its motion, Camelback contended it had not regularly done or solicited business in Maryland, nor engaged in any other persistent course of conduct here, nor had any substantial contacts with this State. Thus, it argued, personal jurisdiction could not properly be asserted under Maryland's long arm statute, Maryland Code (1974), 1984 Repl.Vol., 1985 Cum.Supp.) sec 6-101–6-103 of the Courts and Judicial Proceedings Article, or be consistent with the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The motion was considered by Judge James Sfekas on the pleadings, affidavits, discovery documents, and arguments of the parties. Judge Sfekas found the existence of certain contacts between Camelback and this State, and initially determined that these contacts were sufficient to support jurisdiction. Upon reconsideration, however, he was persuaded that the contacts, while sufficient to satisfy the statutory requirement for long arm jurisdiction, were "insufficient to satisfy the requirements of due process where the injury or tortious act occur[red] outside the state," and he dismissed the action. The Behnings appealed and the Court of Special Appeals reversed, holding that the contacts found by the trial judge were sufficient to satisfy the requirements of due process. *Behning* vs. *Camelback Ski Corp.*, 61 Md.App. 11, 484 A.2d 646 (1984).

The parties agree that under the facts of this case the applicable portion of the long arm statute is sec. 6-103(b)(4), which provides:

(b) *In general.*—A court may exercise personal jurisdiction over a person, who directly or by an agent;

---

2. The motion alternatively asked that service of process be quashed because of alleged procedural deficiencies. That issue was determined adversely to Appellant in the trial court, and has not been pursued on appeal.

(4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from goods, food, services, or manufactured products used or consumed in the State[.] Appellees' contention in this case is that Camelback "regularly does or solicits business . . . in the state." They do not suggest that Camelback engages in any other persistent course of conduct in Maryland, and they concede that Camelback does not derive revenue from anything used or consumed in this State.

[1] This Court has consistently stated that the intent of the legislature in enacting Maryland's long arm statute was to expand the exercise of personal jurisdiction to the limits allowed by the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. *Mohamed* vs. *Michael*, 279 Md. 653, 657, 370 A.2d 551 (1977); *Geelhoed* vs. *Jensen*, 277 Md. 220, 224, 352 A.2d 818 (1976); *Krashes* vs. *White*, 275 Md. 549, 558-59, 341 A.2d 798 (1975); *Lamprecht* vs. *Piper Aircraft Corp.*, 262 Md. 126, 130, 277 A.2d 272 (1971); *Harris* vs. *Arlen Properties*, 256 Md. 185, 195-96, 260 A.2d 22 (1969); *Vitro Electronics* vs. *Milgray*, 255 Md. 498, 504-05, 258 A.2d 749 (1969); *Gilliam* vs. *Moog Industries*, 239 Md. 107, 111, 210 A.2d 390 (1965); *Marriott Corp.* vs. *Village Realty & Inv.*, 58 Md.App. 145, 154, 472 A.2d 510 (1984). We have held that the legislative purpose in the enactment of the long arm statute was, to a great degree, "the expansion of judicial jurisdiction up to but not beyond the outermost limits permitted in this area by the due process decisions of the Supreme Court." *Lamprecht* vs. *Piper Aircraft Corp.*, *supra*, 262 Md. at 130, 277 A.2d 272.

The basic standard to be applied in determining whether this State may exercise personal jurisdiction over Camelback is whether that corporation has "certain minimum contacts with [Maryland] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co.* vs. *Washington*, 326 U.S. 310, 316, 66 S.Ct.

154, 158, 90 L.Ed. 95 (1945). As the Supreme Court acknowledged in *Kulko* vs., *California Superior Court*, 436 U.S. 84, 92, 98 S.Ct. 1690, 1696, 56 L.Ed.2d 132 (1978), this standard is not susceptible of mechanical application, and the facts of each case must be weighed to determine whether the requisite "affiliating circumstances" are present:

> We recognize that this determination is one in which few answers will be written "in black and white. The greys are dominant and even among them the shades are innumerable." *Kulko, supra*, 436 U.S. at 92, 98 S.Ct. at 1696 (citation omitted).

Following its decision in *International Shoe*, the Supreme Court, in a series of cases, further developed the standards applicable to a state court's exercise of personal jurisdiction. In *Perkins* vs. *Benguet Mining Co.*, 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952), the Court considered the propriety of Ohio's exercise of jurisdiction over a Philippine mining corporation in a suit brought by a nonresident of Ohio. The corporation had been carrying on a continuous and systematic, but limited, part of its general business in Ohio. The president of the corporation was served with summons in Ohio while he was engaged in corporate business there. The cause of action sued upon did not arise in Ohio and did not relate to the corporation's activities there. The Court held that the Fourteenth Amendment left Ohio free to take or decline jurisdiction over the corporation. Despite the fact that the cause of action in *Perkins* was not related to the corporation's activities in Ohio, the Court noted that if a corporation carried on "continuous and systematic" corporate activities in a forum state, those activities would be sufficient to make it fair and reasonable to subject that corporation to proceedings *in personam* even though the cause of action was unrelated to the defendant's activities in that state. 342 U.S. at 445-49.

The Court further expanded the flexibility of the doctrine of personal jurisdiction in *McGee* vs. *International Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957). In *McGee*, the Court ruled unanimously that the issuance and delivery of a

single life insurance policy by a Texas insurance company to a California resident (who paid the premiums by mail) gave the California courts the power to exercise jurisdiction in a beneficiary's suit for the policy proceeds. The Court noted that the trend of expanding the scope of state jurisdiction over foreign corporations and other nonresidents was "attributable to the fundamental transformation of our national economy over the years." 355 U.S. at 222, 78 S.Ct. at 200. Although the insurance company had never maintained an office or agent in California and there was no evidence to show that it had ever solicited or done any other insurance business in California, the Court stated that the elements of due process had been satisfied:

> It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with the State. The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. *Id.* at 223, 78 S.Ct. at 201 (citations omitted).

Despite a clear emphasis in *McGee* that personal jurisdiction could be upheld on the basis of very minimal contacts with the forum state, the Court, later in the same term, demonstrated that there were limits beyond which due process could not be stretched. In *Hanson* vs. *Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed2d 1283 (1958), the Court overturned Florida's exercise of jurisdiction over a Delaware bank. The complex fact situation in *Hanson* concerned a Pennsylvania resident who executed a trust instrument in Delaware, naming a Delaware bank as trustee. The Pennsylvania resident reserved a power of appointment over the remainder of the trust for herself and subsequently moved to Florida and purportedly exercised her power of appointment over the trust while in Florida. Upon her death the residuary legatees of the will brought suit in Florida for the rights to the remainder of the trust. A sharply divided Supreme Court

reversed a Florida court's invalidation of the Delaware trust and its assertion of jurisdiction over the Delaware trustee, noting that the Delaware trustee did not have even those minimal contacts with Florida that were a prerequisite to a state's exercise of power over a party. Therefore, the Court concluded that jurisdiction over the trustee (an indispensable party to the action) had not been obtained. While the Court in *Hanson* recognized the trend of expanding personal jurisdiction over nonresidents begun by the *International Shoe* case, it also emphasized a need for the exercise of restraint and said:

> [I]t is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him. 357 U.S. at 251, 78 S.Ct. at 1238 (citations omitted).

In applying the minimum contacts rule in *Hanson*, the Court noted that a defendant's contact with a forum state would vary with the quality and nature of the defendant's activity, and stated that:

> [I]t is essential in each case that there be some act by which the defendant *purposefully avails* itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. 357 U.S. at 253, 78 S.ct. at 1239 (emphasis added) (citations omitted).

Nearly twenty years passed before the Supreme Court again spoke in this area of the law. In *Shaffer* vs. *Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977), the Court held that

assertions of *in rem* state-court jurisdiction must satisfy due process requirements in the same manner as assertions of *in personam* jurisdiction, and that the "central concern" must be on "the relationship among the defendant, the forum, and the litigation." 433 U.S. at 204, 97 S. Ct. at 2579.

Shortly thereafter, the Court considered *Kulko* vs. *California Superior Court, supra*, and *World-Wide Volkswagen Corp.* vs. *Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d (1980). In each case, the Court found the contacts between the defendant and the forum state to be insufficient to support the assumption of personal jurisdiction. In *World-Wide Volkswagen* the Court pointed out that the "minimum contacts" standard performs two related, but distinguishable functions. "It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to insure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *Id.* at 292, 100 S.Ct. at 564. Drawing from the earlier teachings of *Hanson* vs. *Denckla, supra*, the Court said:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment. *Id.* at 294, 100 S.Ct. at 565.

More recently, the Supreme Court has addressed the issue of long arm jurisdiction in four cases: *Keeton* vs. *Hustler Magazine, Inc.*, 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984); *Calder* vs. *Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984); *Helicopteros Nacionales de Columbia, S.A.* vs. *Hall*, 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984); and *Burger King Corp.* vs *Rudzewicz*, —U.S.—, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). In *Keeton*, New Hampshire's claim of

personal jurisdiction over the publisher of *Hustler* magazine in a libel case was predicated upon a showing of sales activity within the state.[3] Noting that the contacts of Hustler Magazine, Inc. with New Hampshire were less than those shown to have existed between the defendant corporation and the forum state in *Perkins* vs. *Benguet Mining Co., supra*, and that Hustler's activities in the forum may not be so substantial as to support jurisdiction over a cause of action unrelated to those activities," the Court nevertheless upheld jurisdiction because the cause of action arose out of the very activity that was being conducted, in part, in New Hampshire.

The concept of requiring more substantial contacts to support a claim of jurisdiction in a suit not arising out of or related to the defendant's contacts with the forum (general jurisdiction) than in a suit that does arise out of or is related to those contacts (specific jurisdiction) was not a novel one. In *Hanson* vs. *Denckla, supra*, 357 U.S. at 251, 78 S.Ct. at 1238, the Court made a similar comparison:

> The cause of action in this case is not one that arises out of an act done of transaction consummated in the forum State. In that respect, it differs from *McGee* vs. *International Life Ins. Co.* . . . and the cases there cited.

See also Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 Sup.Ct.Rev. 77, 80-88; and von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv.L.Rev. 1136 (1966). The nature and importance of the distinction to be drawn between an assertion of general jurisdiction and an assertion of specific jurisdiction were more fully discussed by the Court in *Helicopteros Nacionales de Columbia, S.A., supra*. There, the Court made it clear that unlike the specific jurisdiction case of *McGee* vs. *International Life Ins. Co., supra*, where a single transaction was sufficient to support jurisdiction, the required showing in general jurisdiction cases must be "the kind of continuous and systematic

3. The evidence showed monthly sales of ten thousand to fifteen thousand copies of *Hustler* magazine within New Hampshire.

general business contacts the Court found to exist in *Perkins*." 466 U.S. at 416, 104 S.Ct. at 1873. Professor James concluded that if "plaintiff's injury does not arise out of something done in the forum state, then other contacts between the corporation and the state must be *fairly extensive* before the burden of defending a suit there may be imposed upon it without offending "traditional notions of fair play and substantial justice.'" F. James, *Civil Procedure* 640 (1965) (emphasis added). The Restatement (Second) of Conflict of Laws (1971) incorporates this concept at Sec. 47(2):

> A state has power to exercise judicial jurisdiction over a foreign corporation which does business in the state with respect to causes of action that do not arise from the business done in the state if this business is so continuous and substantial as to make it reasonable for the state to exercise such jurisdiction.

[2] We turn to a consideration of the particular facts of this case, and an evaluation of the contacts shown to have existed between Camelback and this State. Camelback is a Pennsylvania corporation with no charter or license to do business in Maryland, and no agent for service of process in this State. No bank accounts or telephone listings are maintained by Camelback in Maryland, and no taxes are paid to this State. Camelback sells no products here and derives its total income from its ski resort in Pennsylvania.

Camelback's primary marketing area consists of eastern Pennsylvania, the New York City metropolitan area, and northern New Jersey, and it is to this market that Camelback directs its advertising efforts. Camelback has not allocated or expended any of its funds for the purchase of advertising in Maryland.

On the other hand, Camelback has engaged in some solicitation of business within this State, and has provided information to publishers of trade magazines with knowledge that such information would be disseminated in Maryland. Additionally, Camelback has, on occasion and upon request, sent its brochures to ski shops within this State, and it maintains a toll-free telephone

number which may be used by anyone in this State to obtain recorded information concerning ski conditions at the resort. It is the character, quality, consistency, and cause of these contacts that we must examine to determine whether they are sufficient, and of such a continuous and systematic nature as will support the assertion of personal jurisdiction over Camelback.

We first consider the active solicitation of business within this State. The record discloses that Camelback is primarily a "day"[4] resort, although it does receive some "destination" business. Its primary market area is therefore comprised of those parts of Pennsylvania, New York and New Jersey lying within a 100 mile radius of the resort. On one occasion in 1982, in an effort to develop a secondary market, Camelback sent a sales representative into the Washington metropolitan area. This solicitation was for the purpose of developing mid-week business, and was apparently undertaken in cooperation with local hotels and motels. The sales representative visited travel agencies, and attempted to stimulate interest in the booking of mid-week "destination" business by offering a ten percent commission to the travel agents. Camelback's sales representative spent several days in Virginia, and in passing through Maryland visited ten or eleven travel agencies and one or two military installations. Having no current brochures, the representative secured the business card of any agent indicating an interest, and thereafter mailed current brochures to those agents. Camelback characterized this as an "exploratory trip" to determine the feasibility of expanding its market. It concluded that the venture was a "bomb" in terms of generating business for its ski resort from Maryland residents. No Maryland travel agents ever took advantage of the ski/stay package and the record indicates that no commission was ever paid to any travel agency in Maryland. Camelback asserts that the failure of this isolated trip to generate new business served to

4. This term refers to the fact that a majority of the resort's clientele comes to the area for a day of skiing and then returns home. In contrast, a "destination" resort is one which attracts skiers for extended periods of time.

reinforce its long standing policy of restricting its solicitation efforts to its primary market area.

We are not persuaded that Camelback's sending of a representative to Maryland on a one day trip amounts to more than a contact of an isolated nature. It does not amount to the "regular" solicitation of business or to a "persistent course of conduct" in this State within the contemplation of Sec. 6-103(b)(4), nor is it a contact of a "continuous and systematic" nature sufficient to satisfy the requirements of due process in a general jurisdiction case.

The trial judge also found that Camelback had contact with Maryland because of its "[d]issemination of information (to advertise) in national and regional publications." The evidence is uncontradicted that Camelback did not purchase advertising in publications intended for distribution in Maryland. Appellees did introduce evidence that information concerning Camelback had appeared in newspapers and magazines having a general circulation in Maryland, but there was no evidence that Camelback requested, paid for, or was even aware of the advertisements. To the contrary, the record showed that tour companies would offer package ski trips to a number of different resorts, and Camelback would be listed as one of the options. Camelback did offer a discount to any group of twenty or more persons, but it did not participate in the formation of the group or contribute in any way to the preparation or publication of the advertisements. Information concerning the facilities at Camelback would also appear from time to time in magazine and newspaper articles published in Maryland. Information for such articles could have been obtained as a result of a visit to the facility by the author, or by consulting a national publication that provides descriptive information concerning all major ski resorts, or by calling Camelback and requesting the information.

It appears that in finding a contact with Maryland through advertising efforts, the trial judge relied primarily on Camelback's listing[5] in *Ski Resorts* magazine, a commercial publication intended for distribution in Washington, Baltimore, and vicinity. Camelback neither sought nor paid for this listing. An affidavit filed by the publisher of the magazine shows that the information was obtained, and the listing written, by magazine staff members at no charge to the ski resort. In the affidavit, the publisher stated that Camelback "has never purchased advertising of any kind in the Baltimore-Washington edition of *Ski Resorts*, despite . . . annual attempts to sell such space."[6]

The information for the listing in *Ski Resorts* magazine, although available from other sources, was in fact furnished by Camelback. The staff of the magazine sent a request for information, and this was completed and returned by Camelback.

We agree generally with the recent observations of the Fourth Circuit Court of Appeals that "[j]urisdiction may not be manufactured by the conduct of others," and "[t]he significant contacts considered are those actually generated by the defendant." *Chung* vs. *Nana Development Corp.*, 783 F.2d 1124, 1127 (4th Cir. 1986). However, we do not accept Camelback's suggestion that the listings must be disregarded entirely because they do not constitute paid advertisements. Camelback's direct participation in providing information to *Ski Resorts* magazine with knowledge that a listing would be published in a magazine enjoying general publication in this State constitutes a contact with this State, but under the circumstances we cannot characterize it as conduct by which "the defendant purposefully avail[ed] itself of the privilege of conducting activities within [this State], thus invoking the benefits and protections of its laws." *Hanson vs. Denckla, supra,* 357 U.S. at 253, 78 S.Ct. at 1239.

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5. Such a "listing," as opposed to placing an advertisement, provides straight-forward factual information about a ski area such as trail layouts, rates, location and travel time.

6. The evidence did show that Camelback has purchased advertising in the Philadelphia edition of *Ski Resorts*magazine, a publication intended for distribution in Camelback's primary marketing area.

Judge Sfekas found as an additional contact the "maintenance of a toll free phone number for Maryland residents." The record discloses that Camelback maintained two toll-free telephone numbers for the purpose of providing reports of current ski conditions without charge to callers. However, the evidence in uncontroverted that Camelback did not set out to purchase a toll-free number for use by Maryland residents, but rather found that the purchase of the service for states within its primary marketing area automatically included service for Maryland, as well as other states outside that area. It is true that Camelback's brochures included the toll-free numbers, together with a listing of the states in which they could be used, including Maryland. However, as we shall discuss more fully *infra*, these brochures were not generally or systematically distributed in Maryland.

The fourth and final contact found to exist by Judge Sfekas was "the sending of information and brochures to Maryland residents and businesses." There is no evidence to support a finding that Camelback mailed brochures directly to residents of the State. The record does show that on request, Camelback would mail its brochures to any ski shop requesting the, and that in a given year it received five or six such requests from ski shops in Maryland. Mailings to Maryland ski shops were not automatically repeated on an annual basis, and were made only in response to a specific request. The only other distribution of Camelback's brochures within this State involved the ten or eleven follow-up mailings made by the sales representative following his unsuccessful attempt to solicit travel agency business in 1982.

Notwithstanding claims to the contrary by the Behinings, the jurisdiction they seek is general, and not specific. Their cause of action arose out of and is related to the alleged negligence of Camelback in the design, construction, and maintenance of its sk slopes in Pennsylvania. Even assuming, without in any way inti mating, that a case of specific jurisdiction Behnings be made ou by showing that the Behnings traveled to Camelback as a result o one of the few solicitations made by Camelback in this State

7. It is clear that the cause of action did not arise out of any conta Camelback had with Maryland. We need not here address the questic

there is no evidence to support that contention. Indeed, as the Court of Special Appeals noted, the Behnings conceded before that court that their trip to Camelback had not been triggered by Appellant's solicitation in Maryland. *Behning vs. Camelback Ski Corporation,* 61 Md.App. 11, 20 n. 2, 484 A.2d 646 (1984).

While Camelback concedely has had contacts with the State of Maryland, we find those contacts, individually and collectively, insufficient to sustain a claim of general jurisdiction over that corporation. The contacts have been random, sporadic, and in some cases fortuitous. The contacts can hardly be described as of a "continuous and systematic" nature, nor does it appear that Camelback has *regularly* done or solicited business, or engaged in any other persistent course of conduct in this State. We are unable to find that by its conduct Camelback has purposefully availed itself of the privilege of conducting activities within this State and thereby invoked the benefit and protection of its laws, nor are we able to say that Camelback's conduct in connection with this State has been such that it should reasonable have "anticipated[d] being haled into court" here. *World-Wide Volkswagen Corp. vs. Woodson, supra,* 444 U.S. at 297, 100 S.Ct. at 567.

The legitimate interest that this State has in providing a forum to one of its citizens, and the fact that the action could probably be litigated in this State without significant inconvenience to the Appellant, while factors worthy of serious consideration, cannot alone serve as the foundation for assumption of jurisdiction. *World-Wide Volkswagen Corp. vs. Woodson, supra,* 444 U.S., at 294, 100 S.Ct. at 565; *Hanson vs. Denckla, supra,* 357 U.S. at 251, 78 S.Ct. at 1238. The protections of the Due Process Clause

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of whether the terms "arising out of" and "related to" have different meanings in this context. This question, and the related question of whether, if the terms do have different meanings, an assertion of jurisdiction based upon a cause of action related to but not arising out a defendant's contacts should be analyzed as an assertion of specific jurisdiction, are questions specifically left open by the Supreme Court. See *Helicopteros Nacionales de Columbia, S.A.* vs. *Hall,* 466 U.S. 408, 415n. 10, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984).

require that this State decline Appellees' request to exercise jurisdiction over this cause of action.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED AND CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO AFFIRM THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY. RESPONDENTS TO PAY THE COSTS.

APPENDIX B

REPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 225

September Term, 1984

RALPH C. BEHNING, et ux.

v.

CAMELBACK SKI CORPORATION

Weant
Bell, Rosalyn B.
Karwacki
JJ

OPINION BY BELL, J.

FILED: December 7, 1984

Ralph Behning, a Maryland resident, was rendered quadriplegic as a result of injuries he sustained while skiing at the Camelback Ski area in Tannersville, Pennsylvania. Behning and his wife brought suit in the Circuit Court for Baltimore County against Camelback Ski Corporation, the Pennsylvania corporation which owns and operates the ski area.

Camelback challenged the court's jurisdiction by filing a Motion Raising Preliminary Objections.[1] The court denied Camelback's motion finding that Camelback had sufficient contacts with Maryland to assert personal jurisdiction under Md. Cts. & Jud. Proc. Code Ann. Section 6-103(b)(4) (1984 Repl. Vol.), consistent with the requirements of the Due Process Clause of the Fourteenth Amendment.

1. Camelback also challenged the sufficiency of service. That issue, however, has not been pursued on appeal.

Camelback moved for reconsideration of the court's factual findings and conclusions. In an Amended Memorandum Opinion, the court reaffirmed its earlier findings regarding Camelback's contacts with the forum, but under the particular circumstances, granted Camelback's motion. The court based its decision on its analysis that even though Camelback had contacts which put it within the purview of the long arm statute, they did not amount to the fairly extensive contacts required by due process.

The Behnings appeal this determination. The question for our review is whether appellee's activities in Maryland are sufficient to subject it to the jurisdiction of our courts on a statutory and constitutional due process basis.

STATUTORY BASIS OF JURISDICTION

Appellants seek to establish jurisdiction over appellee under Section 6-103(b)(4), *supra*, of the Maryland long arm statute which provides that:

> "(b) *In general*—A court may exercise personal jurisdiction over a person, who directly or by an agent:
>
> * * * *
>
> (4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from goods, food, services, or manufactured products used or consumed in the State;"

To assert jurisdiction under Section 6-103(b)(4), *supra*, the court must find that the defendant's activities in the State met the statutory requirements either when the suit was filed, *Carter* v. *Massey*, 436 F. Supp. 29, 35 (Dist. Ct. Md. 1977), or when the cause of action arose. *Geelhoed* v. *Jensen*, 277 Md. 220, 233, 352 A.2d 818 (1976).

The court found that appellee's conduct in the forum, at the time the suit was filed, was sufficient to submit it to the jurisdiction of the Maryland courts. This included: advertising in

national and regional publications disseminated in Maryland; maintaining a toll free number for Maryland residents; distributing ski information and brochures to Maryland residents and businesses; and sending a representative into Maryland to explore new marketing possibilities. Further, the court found that these activities satisfied both the first and second prongs of Section 6-103(b)(4); that is, they amounted to the "regular solicitation of business" and to "a persistent course of conduct in the State." The court did not find that appellee derived revenue from products used or consumed in the State, which would have satisfied the third prong. Appellee's contacts with Maryland need only have satisfied one of the three prongs of Section 6-103(b)(4) to establish *in personam* jurisdiction.

Appellee contests the factual findings of the court and asserts that information about its ski area contained in publications distributed in Maryland represents the unilateral activity of third parties and that maintenance of its toll free number for Maryland residents was also the unilateral conduct of another party. It concludes that these actions should not be considered contacts with this State. It is true that the independent activity of another party cannot satisfy the requirement of contact between appellee and the forum. *Helicopteros Nacionales de Colombia, S.A.* v. *Hall,* U.S. 104 S. Ct. 1868, 1873, L.Ed. (1984). The activities from which appellee here attempts to disassociate itself, however, were undertakings in which it played an active role.

The standard this Court applies in reviewing the trial court's factual findings is whether the court was clearly erroneous. Md. Rule 1086. Thus, we will only arrive at a different factual conclusion if our review indicates that the court was clearly erroneous in its fact finding. *Simko, Inc.* v. *Graymar Co.*, 55 Md. App. 561, 464 A.2d 1104 (1983).

The record supports the court's finding that appellee advertised in national and regional publications distributed in Maryland. Appellee claims that information about its ski area contained in publications such as *Ski Resorts Magazine* did not constitute advertising by the ski resort because magazine staff wrote the

copy and the information was published with no charge to appellee. In this context, however, appellee neglects to mention that it provided the information used by magazine staff. As the Supreme Court stated in *World Wide Volkswagon* v. *Woodson*, 444 U.S. 286, 294, 100 S.Ct. 559, 62 L. Ed. 2d 490 (1980), an out-of-state defendant may serve or seek to serve the market in the forum state either directly or indirectly through others. Appellee's cooperation in providing information to publications like *Ski Resorts Magazine* was an effort to serve the market indirectly and thus a contact with the State.

Appellee also directly sought to serve the Maryland market through maintenance of its toll free number and distribution of its brochures in Maryland. Although appellee claims that this service to the State was unavoidably included in its purchase of a toll free number, the record shows that appellee advertised in brochures the existence of this number for Maryland residents. Additionally, appellee claims that it sent its brochures to Maryland ski shops only at their request. What was significant was not the request, but that appellee did in fact intentionally send its brochures into Maryland.

Our review of the record demonstrates that the court was not clearly erroneous in its findings of fact. Md. Rule 1086. We, therefore, concur in that part of the court's ruling.

DUE PROCESS REQUIREMENTS

It is well established that the Legislature's intent in adopting Md. Cts. & Jud. Proc. Code Ann. Section 6-103, *supra*, was to extend *in personam* jurisdiction to the limits permitted by the Due Process Clause of the Fourteenth Amendment. *Krashes* v. *White*, 275 Md. 540, 559, 341 A.2d 798 (1975); *Geelhoed* v. *Jensen*, 277 Md. at 224. The terms contained in Section 6-103(b)(4), therefore, derive their meaning from and are coextensive with the principles of due process enunciated by the Supreme Court in *International Shoe Co.* v. *State of Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95(1945) and its progeny.

Geelhoed v. *Jensen*, 277 Md. at 227; *McKown* v. *Criser's Sales & Service*, 48 Md. App. 739, 744, 430 A.2d 91 (1981).

The due process standard of "minimum contacts" was first stated in *International Shoe Co.*, *supra*, as follows:

> ". . . due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have *certain minimum contacts* with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (emphasis added).

326 U.S. at 316.

The "minimum contacts" standard, as further refined by the case law, requires that we balance the following factors to determine whether the assertion of jurisdiction is consistent with due process: (1) the source of the action; that is, whether this is a case of specific or general jurisdiction, *Geelhoed* v. *Jensen*, 277 Md. at 230; *Carter* v. *Massey*, 436 F. Supp. at 33; (2) the nature and quality of appellee's contacts with the State, *Id.*, *Ratliff* v. *Cooper*, 444 F.2d 745, 747 (1971); (3) the State's interest in providing a forum for the cause of action, *Geelhoed* v. *Jensen, supra; Carter* v. *Massey, supra;* and (4) the convenience of the parties. *Id.*

1. SOURCE OF THE ACTION

First we must determine whether the source of the action is within the specific or general jurisdictional powers of the State.

The State exercises specific jurisdiction where the cause of action arises out of or is related to the out-of-state defendant's activities in the forum. Since the relationship among the defendant, the State and the litigation is the basis upon which such jurisdiction is asserted, the defendant need not have other contacts with the State. *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, U.S. at , 104 S. Ct. at 1872. Alternatively, where the suit does not arise out of the defendant's conduct in the forum, the State may exercise its powers of general jurisdiction so

long as the out-of-state defendant has sufficient independent contacts. If the defendant has such contacts, maintenance of the action does not violate due process. *Id.*

Appellants' alleged injuries did not arise out of appellee's contacts with Maryland.[2] The source of this action is, therefore, within the State's general jurisdictional powers.

2. NATURE AND QUALITY OF APPELLEE'S CONTACTS

Next we must determine whether appellee's contacts with Maryland are sufficient to meet the requirements of due process.

In a case such as the one *sub judice*, due process requires that appellee have "continuous and systematic" contacts with the State. *Helicopteros Nacionales de Colombia, S.A.* v. *Hall, supra; Geelhoed* v. *Jensen, supra.* This Court has described the required contacts in a case of general jurisdiction in the following way:

> While *in personam* jurisdiction thus may be obtained over an out-of-state defendant even where the alleged injury has occurred outside Maryland, in such a case due process requires 'other contacts between the [defendant] and the state [to] be *fairly extensive* before the burden of defending a suit there may be imposed . . . without offending 'traditional notions of fair play and substantial justice.'" *Lewron Tel.* v. *Int'l All. of Th. St. Emp.*, 37 Md.App. 662, 666 (1977) quoting F. James *Civil Procedure* 640 (1965).

The contacts required by due process are coextensive with the provisions of Section6-103(b)(4). *Geelhoed* v. *Jensen*, 277 Md. at 227; *McKown* v. *Criser's Sales & Service*, *supra.* As we discussed earlier, the conduct in the present case meets those statutory requirements.

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2. Appellants' Declaration alleged that they had traveled to Camelback ski area in response to commercial solicitation. The deposition testimony was ambiguous, however, regarding whether appellants had seen a Camelback brochure or other advertising prior to going to the ski area. On appeal, appellants conceded that their trip to Camelback had not been triggered by appellee's solicitation in Maryland.

Our review of these activities indicates that appellee directly sought to provide information to Maryland residents by maintaining a toll free number and by including this number in its brochures which it distributed to Maryland ski shops. Indirectly, through national and regional publications distributed in this State, appellee also provided information about its ski area to Maryland residents. Appellee sent an agent into Maryland for the express purpose of exploring new marketing possibilities. We conclude that appellee's activities, taken as a whole, are sufficiently continuous and systematic to meet the requirements of due process.

3. STATE INTEREST

The State's interest in providing a forum for its citizens plays a legitimate role in the balancing process.

One appellant, a Maryland resident, was seriously injured outside the State by the alleged act or omission of appellee. Because this appellant's injuries rendered him quadriplegic, he may need to utilize resources of this State for his care and maintenance. Further, the appellants have alleged harm to the marital entity, the situs of which is Maryland. This State has a special interest in the domestic relations of its citizens and in entertaining a suit to remedy alleged wrongs to those relations. *Geelhoed* v. *Jensen,* 277 Md. at 233.

4. CONVENIENCE OF THE PARTIES

We note at the outset that appellee has made no allegations as to any inconvenience it would suffer by litigating in this forum. Appellee is located in Tannersville, Pennsylvania which is less than 170 miles away from Towson, where the circuit court sits. The appellant and, we infer, the major medical witnesses likely to be called on the question of damages are in Maryland.

CONCLUSION

The appellate courts of Maryland have not previously determined whether the long arm statute applies to an out-of-state

hotel or recreational facility.[3] Both parties refer to cases from other jurisdictions, and appellee relies on them heavily in asserting the lack of sufficient contacts in the present case for this forum to exercise personal jurisdiction. We do not consider these authorities sufficiently persuasive. Rather, we base our decision on existing Maryland case law.

The State is called upon here to assert its general jurisdictional powers. Appellee must, therefore, have sufficient independent contacts with Maryland. Appellee's contacts herein are continuous and systematic. Furthermore, the State's interest is strong since one appellant, a Maryland resident, was seriously injured, and the marital entity, the situs of which is Maryland, was alleged to have suffered injury. Finally, whatever inconvenience appellee would suffer from being forced to litigate in Maryland appears to be minimal. Thus, we conclude that maintenance of this action is consistent with the requirements of due process. Appellee's motion raising preliminary objections should have been denied.

JUDGMENT REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. APPELLEE TO PAY COSTS.

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3. The United States District Court in the case of *Greenwood* v. *Tides*, 504 F. Supp. 992 (Dist.Ct. Md. 1980), did apply the Maryland long arm statute to an out-of-state resort.

APPENDIX C

IN THE CIRCUIT COURT FOR
BALTIMORE COUNTY AT LAW

Case No. 82-L-2488

RALPH C. BEHNING
MARY K. BEHNING

Plaintiffs

v.

CAMELBACK SKI CORPORATION
T/A CAMELBACK SKI AREAS

Defendant

MEMORANDUM OPINION

Defendant, Camelback Ski Corporation, has raised a Motion Raising Preliminary Objection for lack of personal jurisdiction in the negligence suit brought by Ralph Behning, a Maryland resident injured on Defendant's ski slopes. Camelback is a Pennsylvania corporation that operates a ski resort in the State of Pennsylvania. The question is whether the Defendant has engaged in conduct in Maryland which would satisfy the Maryland long-arm statute, Maryland Code, Courts and Judicial Proceedings Article, Section 6-103(b)(4), which states that "a court may exercise personal jurisdiction over a person who directly or by an agent: causes tortious injury in the State or outside the State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue . . . in the State." Satisfaction of any one of these three prongs: (1) regularly does or solicits business in Maryland; (2) engages in any other persistent course of conduct in this State; or (3) derives substantial revenue is sufficient to confer jurisdiction under the statute. *Greenwood* v. *Tides Inn, Inc.*, 504 F. Supp. 992, 994.

After a review of Maryland law, the Court finds that although Defendant's contacts with this state are minimal, they are sufficient to satisfy the due process standard and Section 6-103(b)(4). The *Greenwood* case presents a similar factual situation to the case at bar. Judge Kaufman discussed the Maryland long-arm statute at length holding that the Defendant's activities met the first two prongs of (b)(4). Defendant, Tides Inn, is an out-of-state recreational facility who had mailed over a thousand newsletters to former guests in Maryland, had advertisements in national magazines, and maintained a toll free phone number for Maryland residents. In response to the argument that it was not solicitation since Maryland residents requested brochures and information, the Court stated that "whether defendant, Tides, sent its newsletter at its readers behest is irrelevant; what is important is that defendant, Tides, intentionally sent its newsletters into Maryland." *Id.* at 996.

Judge Kaufman noted the case of *McLaughlin* v. *Copeland*, 435 F. Supp. 513 (D. Md. 1977) in which that Defendant had written six letters to Maryland within four months, participated in a meeting and had engaged in settlement discussions in a law suit. This was sufficient to satisfy the second prong of (b)(4). Similar to the Tides, Defendant Camelback advertises in national and regional publications and maintains a toll free phone number for Maryland residents. It sends its information and brochures to Maryland residents and businesses. Further, a representative of the Defendant had come into the State to explore new marketing possibilities.

The legislative purpose in enacting Maryland's longarm statute "was the expansion of judicial jurisdiction up to but not beyond the outermost limits permitted in this area by due process decisions of the Supreme Court." *Lamprecht* v. *Piper Aircraft Corp.*, 262 Md. 126, 130 (1971).

This Court concludes that Defendant's activities meet the first two prongs of Section 6-103(b) (4) and that longarm jurisdiction is present. Defendant's Motion raising Preliminary Objection, therefore, is denied. Defendant is to file responsive pleading within twenty (20) days.

.....

JUDGE JAMES S. SPEKAS

Dated: .....

Copies to:
George W. White, Esquire
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Barrett W. Freelander, Esquire
Court File

APPENDIX D

IN THE CIRCUIT COURT FOR
BALTIMORE COUNTY AT LAW

Case No. 82-L-2488

RALPH C. BEHNING
MARY K. BEHNING

Plaintiffs

v.

CAMELBACK SKI CORPORATION
T/A CAMELBACK SKI AREAS
CAMELBACK ASSOCIATES

Defendants

MEMORANDUM OPINION

This opinion supersedes the earlier opinion of this Court denying the Motion Raising Preliminary Objection brought by Defendant Camelback for lack of jurisdiction. This Court has had further opportunity to study the question in response to Defendant's Motion for Reconsideration. It is difficult to deny a seriously injured Maryland resident his day in court. However, after careful reconsideration, this Court has determined that while its prior findings of fact are still valid, its ruling as to the law was in error.

The Maryland long arm statute, Md. Cts. & Jud. Proc. Code Ann., Section 6-303(b) (1)-(4) (1974), was enacted to extend the jurisdiction of the Maryland courts to the limits of constitutionality. It is recognized that in order to determine if the application of long arm jurisdiction to a defendant is correct the court must involve itself in a two-step process. The first step determines if the defendant's conduct in Maryland falls within the provisions of the statute; the second step attempts to determine if the conduct, upon which the plaintiff relies to find jurisdiction,

satisfies the requirements of due process. On at least one occasion the Federal District Court of Maryland has stated that while the steps are different the same standard is applied to both. *Carter* v. *Massey*, 436 F. Supp. 29 (D. Md. 1977).[1] However, the *Carter* court's pronouncement appears to be the exception rather than the rule. The Maryland courts have also intimated that they consider the process as two completely different steps with separate standards. In *Lamprecht* v. *Piper Aircraft Corp.*, 262 Md. 126 (1971), the court held that while the defendant's conduct put it within the purview of the statute, it was insufficient to meet the requirements of due process. Inasmuch as no separate finding was made at trial the court remanded the case to determine if the defendant's activities consisted of some acts by which the defendant "purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws." *Id*, at 132.

In order to satisfy the due process requirements of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945) and its progeny, the federal courts have required fairly extensive contacts between the defendant and forum state when the injury occurs outside the forum state. See, *Greenwood* v. *Tides Inn, Inc.*, 504 F. Supp. 992 (D. Md. 1980); *United Merchants and Mfg., Inc.* v. *Dash, Inc.*, 439 F. Supp. 1078 (D. Md. 1977); *Carter* v. *Massey*, 436 F. Supp. 29 (D. Md. 1977); *McLaughlin* v. *Copeland*, 435 F. Supp. 513 (D. Md. 1977). The Maryland courts have necessarily followed federal law on the requirements of due process in this context. *Craig* v. *General Finance Corp. of Illinois*, 504 F. Supp. 1033 (D. Md. 1980). In *Geelhoed* v. *Jensen*, 277 Md. 220 (1976), the defendant in a suit for criminal conversation opposed the court's jurisdiction over him inasmuch as the tortious act was committed in California. The court noted that due process required more substantial contacts where the tortious act occurs

1. In *Carter* v. *Massey*, 436 F. Supp. 29 (D. Md. 1977) the court, despite its opinion that the same standard is applied, nonetheless adhered to the requirement of more substantial contacts where the cause of action or injury arises out of state.

outside of Maryland; however, it found that the defendant's "sufficiently systematic and continuous contacts nevertheless justif(ied) the exercise of jurisdiction." *Id.* at 232.

Later, in *Lewron Television, Inc.* v. *Int'l. Alliance of Theatrical Stage Employees, et. al.*, 37 Md. App. 662 (1977), the plaintiff attempted to get jurisdiction over the International of a union which had locals in Maryland. The court noted that while long-arm jurisdiction may be available "even where injury has occurred outside Maryland, in such a case due process requires 'other contacts between the [defendant] and the state [to] be *fairly extensive* before the burden of defending a suit . . . may be imposed.'" *Id.* at 666 (Emphasis supplied).

Applying the recognized two-step analysis to the instant case, the defendant's activities, as proven by the plaintiff, may be sufficient to find jurisdiction under the statute; however, they are insufficient to satisfy the requirements of due process where the injury or tortious act occurs outside the state. The defendant's contacts in Maryland before the accident, as proved by the plaintiff, consist of: (1) Dissemination of information (to advertise)[2] in national and regional publications; (2) maintenance of a toll free phone number for Maryland residents; (3) the sending of information and brochures to Maryland residents and businesses; and (4) the sending of a representative into Maryland to explore new marketing possibilities. The plaintiffs have not proven that the defendant, prior to the accident, purposefully availed himself of the benefits and protections of the State of Maryland. Consequently, while the defendant has had some conduct in Maryland which puts it within the purview of the long-arm statute the plaintiff has not proved that the defendant has the fairly extensive contacts with the State that due process requires in this situation.

2. The Court quotes *Webster's New Collegiate Dictionary*, 8th Ed. (1977) for the definition of the verb "advertise": "to call public attention to, especially by emphasizing desirable qualities so as to arouse a desire to buy or patronize."

Defendant's Motion Raising Preliminary Objection, therefore, is granted, and the case is dismissed. Costs to be paid by the Plaintiff.

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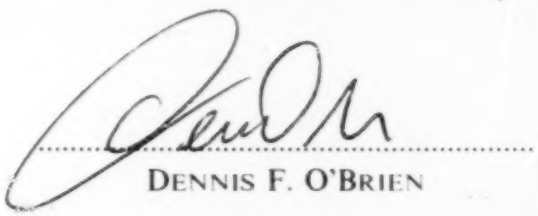
JUDGE JAMES S. SFEKAS

Dated: .....

Copies to:
All Counsel
Court File

CERTIFICATE OF SERVICE

In accordance with Rule 28.3 of the Rules of the Supreme Court of the United States, I hereby certify that I have mailed this 21 day of November, 1986, three copies of this Petition for Writ of Certiorari to Barrett W. Freedlander, Esq., 929 N. Howard Street, Baltimore, Maryland 21202, Attorney for the Respondent.



DENNIS F. O'BRIEN

Supreme Court, U.S.
FILED
DEC 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-839

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

RALPH C. BEHNING, *et al.*,
Petitioners,

v.

CAMELBACK SKI CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Maryland Court of Appeals properly applied the most recent decisions of this Court on the subject of "long-arm" jurisdiction when it determined that 1) general jurisdiction did not exist over a non-resident ski area where contacts with the forum were minimal and isolated, and 2) Petitioners' cause of action did not arise out of or relate to those contacts?

STATEMENT OF CORPORATE AFFILIATIONS

Pursuant to Supreme Court Rule 28.1, Respondent Camelback Ski Corporation states that it has no parent, subsidiary or affiliated corporations.

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STATEMENT OF THE CASE

We are constrained to recite the facts relevant to jurisdiction as Petitioners' presentation contains numerous errors and omits substantial pertinent material.

As the Maryland Court of Appeals correctly held, Camelback Ski Corporation ("Camelback") operates a ski resort at Tannersville, Pennsylvania. As a ski resort, Camelback is a fixed-site recreational facility. Camelback is incorporated in Pennsylvania, and all offices and facilities are located in Pennsylvania. It has no charter or license to do business in Maryland or in any state other than Pennsylvania. Camelback has no agent for service of process in Maryland, owns no real estate in Maryland,

sells no products in Maryland, and offers no services to be performed in Maryland. Similarly, Camelback has no agents or representatives living in Maryland, pays no Maryland taxes, derives no revenue from goods consumed or services performed in Maryland, and does not manufacture, sell, or distribute any goods or products. All revenues are derived from operation of its ski facility in Pennsylvania. App. A-9.[1]

Camelback is a "day" as opposed to "destination" resort, in the language of the ski industry. That is, Camelback's clientele is comprised primarily, but not exclusively, of skiers who live in the general vicinity of the resort and travel to the area from their homes or businesses for a day or a night of skiing and then return home that same day. In contrast, a destination resort is one whose clientele stays at or near the resort for an extended period of time, typically traveling a substantial distance to the resort. Camelback is located in Northeastern Pennsylvania near that State's borders with New York and New Jersey. Camelback solicits customers from states proximate to its facility. Because of its distance from Maryland, and particularly population centers in Maryland, Camelback by conscious management decision does not devote marketing resources to attract Maryland skiers. App. A-9, A-10.

Petitioners are Maryland residents who traveled to Camelback to ski for the day. The resort was selected not by Petitioners but by friends who drove them to Camelback. As the Court of Appeals found, Petitioners ". . . trip to Camelback had not been triggered by [Camelback's] solicitation in Maryland." App. A-14.

Camelback does not maintain that it has no contacts with Maryland, but rather, that such contacts were so limited that they cannot sustain either general or specific

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[1] All references to "App. ——" relate to the Appendix to Petition for Writ of Certiorari.

jurisdiction. The trial court found, as a matter of fact, that Camelback had only four "contacts" with Maryland:[2] 1) non-paid advertising—disseminating information—in Ski Resorts Magazine distributed in Maryland; 2) sending brochures to ski shops in Maryland upon specific request; 3) maintaining WATS telephone service for Maryland; and 4) sending one employee on a one-time, one-day promotional trip to Maryland two years after Petitioners' injury, which trip produced absolutely no business.[3] In analyzing these four "contacts," the Maryland Court of Appeals determined that individually and collectively, they failed to satisfy both the "continuous and systematic general business contact standard" of *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (*"Helicol"*), and the "persistent course of conduct" standard of the Maryland statute.

Furthermore, while recognizing Petitioners' concession that this case involves general jurisdiction only (App. A-14), the Court of Appeals nonetheless held that Petitioners failed to satisfy a critical element of the specific jurisdiction test; namely, their cause of action does not "arise out of or relate to" the aforesaid four "contacts."

SUMMARY OF ARGUMENT

No basis exists for this Court to assume jurisdiction over this matter. It presents no novel or unique issues. Rather, the Court of Appeals of Maryland, after careful analysis, applied correctly the pertinent decisions of this Court. Moreover, there is an adequate and independent state law ground for sustaining the decision below: *i.e.*,

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[2] Petitioners have attempted at all levels, without success, to impute additional contacts to Camelback; that effort continues before this Court.

[3] Camelback has objected to certain of these factual findings. The Court of Appeals, while not expressly overruling the trial courts factual finding, clearly found no jurisdictional significance whatsoever to the WATS line or the sending of brochures into Maryland. App. A-12 - A-14.

the Court of Appeals found expressly that Camelback's contacts with Maryland were inadequate to satisfy the requirements of the Maryland long-arm statute.

Because Camelback's contacts with Maryland fall far short of "continuous and systematic general business contacts," there can be no general jurisdiction under the Due Process Clause of the Fourteenth Amendment. *Helicol, supra.* Here, Camelback had only four isolated contacts with Maryland. The defendant in *Helicol*, by contrast, had substantially greater contacts, qualitatively and quantitatively; yet, those contacts were inadequate to sustain general jurisdiction. Additionally, there can be no specific jurisdiction under the Due Process Clause because Petitioners' cause of action did not arise out of or relate to Camelback's "minimal" contacts with Maryland as required by *Burger King Corporation v. Rudzewicz*, 471 U.S. ——, 105 S.Ct. 2174 (1985) (*"Burger King"*) and *Helicol, supra.*

ARGUMENT

THE COURT OF APPEALS OF MARYLAND APPLIED THE MOST RECENT DECISIONS OF THIS COURT ON THE SUBJECT OF "LONG-ARM" JURISDICTION

Maryland's Court of Appeals acknowledged and carefully applied the most recent and controlling decisions of this Court relative to the issues presented. Accordingly, there is no basis for granting the Petition for Writ of Certiorari.

In the past several years, after a hiatus of nearly twenty years, the Supreme Court has decided a number of cases that address a State's ability to exercise personal jurisdiction over foreign defendants. One effect of those decisions has been to refocus attention to doctrinal distinctions and analytical requirements originally articulated in *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945).

In declining to exercise personal jurisdiction on behalf of one of its citizens, the Court of Appeals noted and adopted the distinction between "general" and "specific" jurisdiction heretofore absent from Maryland decisions, and then proceeded to analyze the facts of this case applying the standard established by this Court.

First, the Court of Appeals noted that the underlying due process standard

> . . . is not susceptible to mechanical application and the facts of each case must be weighed to determine whether the requisite "affiliating circumstances" are present . . .

App. A-4. The Court recognized that the "central concern" must be in "the relationship among the defendant, the forum, and the litigation." App. A-7 (citation omitted). In evaluating the forum contacts of Camelback in the context of general jurisdiction, the Court of Appeals acknowledged that:

> It is the quality, consistency, and cause of these contacts that we must examine to determine whether they are sufficient, and of such a continuous and systematic nature as will support the assertion of personal jurisdiction over Camelback.

App. A-10.

In short, the Court of Appeals knew the law, knew the proper standards for application of the law, and undertook to apply those standards. And on the facts and the law, the Court of Appeals reached the proper decision. There simply is nothing unique about the decision below that warrants issuance of a Writ of Certiorari.

THE STATE LONG-ARM STATUTE WAS APPLIED

It is axiomatic that the valid exercise of long-arm jurisdiction requires satisfying both due process and state statutory standards. Camelback submits that the Court

of Appeals decision is predicated on a finding that neither test is satisfied.

The Court of Appeals applied the due process standards relating to general and specific jurisdiction, and the pertinent statutory standard to the facts of this case. It expressly determined that Camelback did not regularly do or solicit business or engage in any other persistent course of conduct in Maryland. App. A-11, A-14. Thus, there is clearly an adequate and independent state law basis for the decision of the Court of Appeals and therefore no reason to grant the Petition for Writ of Certiorari in this case.

PETITIONERS' FORMULATION OF SPECIFIC JURISDICTION IS CONTRARY TO THE DECISIONS OF THIS COURT

Petitioners now appear to argue for application of specific jurisdiction only. Therefore, it is necessary to address briefly their concept of specific jurisdiction.[4] In essence, Petitioners argue that if a defendant has "fair warning" or "foreseeability" of causing injury in a forum, the defendant may be subject to jurisdiction for claims related to that injury.[5] This very issue was considered and rejected in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980): "This kind of 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *Burger King, supra* at ——, 105 S.Ct. at 2183.

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[4] It is not at all clear that the issue of specific jurisdiction is properly preserved for review by this Court. App. A-14. Nonetheless, Camelback will address this issue as it appears Petitioners' argument at this level is for application of specific jurisdiction.

[5] In actuality, Petitioners' argument is weaker than described. They do not argue that foreseeability of causing injury in a forum gives rise to jurisdiction, but rather that jurisdiction may be predicated on the foreseeability of eventually causing "effects or consequences" in a forum, based on an injury sustained outside the forum. Pet. p. 7.

Furthermore, Petitioners would eviscerate the "arising out of or relating to" component of specific jurisdiction. Petitioners propose the following rule of law:

> Where multistate commercial activity is involved, it is the *marketing relationship* that establishes the defendant's "minimum contacts" with the forum state as to a cause of action "arising out of or relating to" the *business enterprise regularly pursued or promoted there.* (Emphasis added.)

Pet. p. 9. Translated, Petitioners assert that for purposes of specific jurisdiction, minimal commercial solicitation (*eg.*, of skiers) in a foreign forum is sufficient to establish specific jurisdiction for any cause of action "related to" the subject of the solicitation (*e.g.*, skiing). Thus, Petitioners postulate, if Camelback solicited skiers in Maryland, it is subject to specific jurisdiction in Maryland for any cause of action whatsoever "arising out of or relating to" skiing.

This new formulation is also directly at odds with this Court's holdings. *Burger King* made clear that for specific jurisdiction to lie a plaintiff's cause of action must "arise proximately" from a defendant's forum contact. 105 S.Ct. at 2183. *Accord*, von Mehren and Trautman, *Jurisdiction to Adjudicate, A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1144-45 (1966).

The findings below, unchallenged here, that the Behnings did not travel to Camelback in response to any solicitation by that resort, and that Behnings' cause of action did not "arise out of or relate to" any of Camelbacks' solicitation in Maryland precludes any finding of specific jurisdiction based on the standards previously established by this Court.

CONCLUSION

The Court of Appeals properly applied the pertinent decisions of this Court. Petitioners seek to modify those decisions without support or justification. Accordingly, Respondent urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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